BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals in this case is reported in 115 Federal (2nd) 709. It will be found on pages 58 to 63, inclusive, of the Record. The findings of fact and the opinion of the Board of Tax Appeals are reported in 40 U. S. Board of Tax Appeals, 956, and will be found on pages 16 to 23, inclusive, of the Record.

Jurisdiction.

1. The jurisdiction of this Court is invoked under subdivision (a), Section 347, Title 28, United States Judicial Code, being Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229; 43 Stat. 938.

2. The judgment of the Circuit Court of Appeals was entered on December 18, 1940, and will be found on page 64 of the Record.

3. The nature of the case, the rulings of the Board of Tax Appeals and of the Circuit Court of Appeals, for the Second Circuit, and the reasons why a writ of certiorari should be granted are set forth in the foregoing petition.

Statement of the Case and Question Involved.

The petition for the writ of certiorari contains a statement of the case and of the question involved, as well as of all the facts material to its consideration.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the words "time of such acquisition", appearing in Section 113(a) (5) of the Revenue Act of 1934, which subsection, as far as material, is as follows:

> "Property transmitted at death.—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition * * *.",

mean the date of the death of the testator in every case of a gift by will, whether the interest acquired under the will be vested or contingent.

2. In entering judgment for the respondent.

Summary of Argument.

The petitioner contends that the gift to her was future and contingent and that she did not take any remainder under her father's will until her mother died in 1930; that if the gift to the petitioner were to be considered as immediate, nevertheless, the remainder would be contingent, since the gift was expressly conditioned upon the petitioner outliving her mother ('if she shall outlive my wife'), and survivorship was a condition precedent and futurity was inherent in the gift; that the basis, under the Revenue Act of 1934 (which is the applicable act), for determining gain or loss realized upon property acquired by bequest is the fair market value of such property at the time of its acquisition; and that under that act, which was a re-enactment in that particular of the Revenue Acts of 1921, 1924 and 1926, the time when the petitioner acquired the stocks

in question was the date of her mother's death on April 26, 1930.

Argument.

In making the time of acquisition the basis in the case of property acquired by will, the Revenue Act of 1934 was a re-enactment of the Revenue Acts of 1921, 1924 and 1926. The Revenue Acts of 1921, 1924, 1926, 1928, 1932, 1934, 1936, 1938 and 1939, as they relate to this question, are included in the Appendix.

The Treasury Rulings prior to the Ruling adopted in relation to the Revenue Act of 1934, were to the effect that the "time of acquisition", in the case of a contingent interest, meant the date of vesting. The Treasury Regulations, Rulings, Decisions and Memoranda, being Article 56 of Regulations 45, Ruling and Decision in Cumulative Bulletin No. 3, July-December, 1920, pages 50 and 53, General Counsel's Memorandum No. 10260, Cumulative Bulletin XI-1, January-June, 1932, page 79. General Counsel's Memorandum, Cumulative Bulletin XIV-1, January-June, 1935, page 202, and relevant excerpts from Treasury Regulations 86, Income Tax, Revenue Act of 1934, and Treasury Regulations 103, Income Tax, Internal Revenue Code (1940) are included or summarized in the Appendix.

The Court decisions in relation to the Revenue Acts of 1921, 1924, 1926, and 1928 are uniformly to the effect that acquisition, in the case of a vested remainder created by will, occurs at the death of the testator, while acquisition, in the case of a contingent remainder, occurs at the death of the life tenant.

Chandler v. *Field,* 63 Fed. (2d) 13;

Lane v. *Corwin,* 63 Fed. (2d) 767;

Pringle v. *Commissioner,* 64 Fed. (2d) 863;

Molter v. *Commissioner,* 96 Fed. (2d) 7;
Hopkins v. *Commissioner,* 69 Fed. (2d) 11;
Warner v. *Commissioner,* 72 Fed. (2d) 225;
Roebling v. *Commissioner,* 78 Fed. (2d) 444;
Beers v. *Commissioner,* 78 Fed. (2d) 447;
Twining v. *Commissioner,* 83 Fed. (2d) 954;
Fidelity & Columbia Trust Co. v. *Commissioner,* 90 Fed. (2d) 219.

The petitioner contends that the new Treasury Regulations, in so far as they relate to contingent interests, are ineffectual for the reason that Section 113(a)(5) of the Revenue Acts of 1934, 1936, 1938 and 1939 were re-enactments of the related provisions of the Revenue Acts of 1921, 1924 and 1926, and that Congress, in thus re-enacting the provisions of those Acts, intended the re-enacted sections to mean, and to be construed to mean, just what the *Federal Courts,* in dealing with those sections of the Acts of 1921, 1924 and 1926, and the Regulations in relation to them, had said that they meant.

The following rules seem to be established beyond controversy: (1) that a provision of the Regulations which is not consistent with the Revenue Law is invalid (*Koshland* v. *Helvering,* 298 U. S. 441); (2) that the re-enactment of statutory provisions gives existing Regulations relating thereto the force of law (*Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110; (3) that when a statute is repealed or amended and then re-enacted, the statute is to have the same construction as when previously in force (*The Devonshire,* 13 Fed. 39; *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106, 115).

There has been a uniform holding by the Treasury Department and the Courts in relation to all Revenue Acts

from 1916 to 1932 that acquisition in the case of a contingent interest occurs when the interest vests. The Revenue Act of 1934 should be construed accordingly.

The Senate Committee on Finance, in reporting upon the Revenue Act of 1928, rejected the report of the House Committee suggesting as a basis *the date of the decedent's death.* The Senate Report Number 960, 70th Congress, First Session, page 26, is included in the Appendix. The Senate Committee on Finance, in reporting upon the Revenue Act of 1934, said:

> "Since the 1928 Act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise and inheritance, whether real or personal (*Brewster* v. *Gage,* 280 U. S. 327). Section 113(a)(5) of the House Bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal."

The Congress must have understood that the decision in *Brewster* v. *Gage* related only to vested interests and did not apply to property which did not vest or pass at death but in which only a possibility of an interest or a contingent interest arose at death by reason of the provisions of the will. Otherwise, it would seem that the suggestion of the House Committee, made in its report upon the Revenue Act of 1928, that the words *time of decedent's death* be substituted for the words *time of acquisition,* would have been renewed and accepted by the Senate Committee. The report of the Senate Committee on Finance on the Revenue Act of 1934, Number 558, 73rd Congress, Second Session, pages 34 and 35, is included in the Appendix.

It should not be assumed that the Congress adopted language construed to distinguish between vested and

contingent interests and intended it to take on a meaning different from that which the language had been construed to have, and yet failed to make any explanation or comment in relation to its intention. In fact, there is no ambiguity in Section 113(a)(5) of the Revenue Act of 1934 as a re-enactment of the provisions of the Revenue Act of 1926.

It is submitted that the case of *Helvering* v. *Hallock*, 309 U. S. 196, relied upon by the Court below, has no application to the question here at issue.

The authorities upon which the petitioner more particularly relies to establish her contention that the gift to her in her father's will was future and contingent are the cases of *Smith* v. *Edwards*, 88 N. Y. 92 and *Townshend* v. *Frommer*, 125 N. Y. 446, which explain the rule "where there is no gift but a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives," and the case of *Matter of Crane*, 164 N. Y. 71, which applies the rule; the cases of *Roebling* v. *Commissioner*, 78 Fed. (2d) 444, and *Molter* v. *Commissioner*, 69 Fed. (2d) 7, which explain the rule "if survivorship, or other conditional element is incorporated in the gift or in the designation of the remainderman, such as such children as survive a certain time, the remainder will be contingent," and the cases of *Hall* v. *LaFrance Fire Engine Company*, 158 N. Y. 570; *United States Trust Company* v. *Roche*, 116 N. Y., 120; *McGillis* v. *McGillis*, 154 N. Y. 532, *Brooklyn Trust Company* v. *Phillips*, 134 App. Div., 697, affirmed 201 N. Y. 561; and *National Park Bank* v. *Billings*, 144 App. Div., 536, affirmed 203 N. Y., 556; all of which apply the rule,

and the last one of which clearly, convincingly and decisively applies it.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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